



[39486]

LIBRARY  
SUPREME COURT, U.S.

Office - Supreme Court, U. S.  
FILED

JAN 18 1952

CHARLES ELMORE CROPLEY  
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1951

No. 9

DONALD R. DOREMUS and ANNA E. KLEIN,  
*Appellants,*

*v.*

BOARD OF EDUCATION OF THE BOROUGH OF  
HAWTHORNE and the STATE OF NEW JERSEY,  
*Respondents.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE  
OF NEW JERSEY

BRIEF, *AMICUS CURIAE*, BY THE CITY OF NEW YORK  
ON-BEHALF OF THE BOARD OF EDUCATION OF THE  
CITY OF NEW YORK, WITH SPECIAL REFERENCE TO  
THE NEW YORK CITY PRACTICE OF READING A POR-  
TION OF THE BIBLE, WITHOUT COMMENT, AT ALL  
SCHOOL ASSEMBLIES

January 16, 1952

DENIS M. HURLEY,  
*Corporation Counsel of the City  
of New York.*

MICHAEL A. CASTALDI,  
SEYMOUR B. QUEL,  
DANIEL T. SCANNELL,  
ARTHUR H. KAHN,  
*of Counsel.*

# INDEX

	PAGE
Preliminary Statement .....	1
The Question Presented .....	2
The Interest of the Amicus .....	2
The Secular Purpose of Bible Reading in New York City .....	3
(1) As a means of teaching moral and spiritual values .....	4
(2) As literature .....	6
(3) As part of our American culture .....	9
The Legal Basis of Bible Reading in New York City ..	10
Argument	
The reading of portions of the Bible, without comment, in public school assemblies is constitutionally unobjectionable; that, as an incident to Bible reading, religion generally, or religious thinking, may thereby be aided is subordinate to the proper educational purpose served .....	12
Conclusion .....	24

## TABLE OF CASES

Bradfield v. Roberts, 175 U. S. 291 (1899) .....	15, 19
Cantwell v. Connecticut, 310 U. S. 296 (1940) .....	12
Chaplinsky v. New Hampshire, 315 U. S. 568 (1942) ..	19
Church of the Holy Trinity v. U. S., 143 U. S. 457 (1892)	15
Cochran v. Louisiana, 281 U. S. 370 (1930) .....	15, 18

	PAGE
Everson v. New Jersey, 330 U. S. 1 (1947) .....	12, 13, 15, 16, 18
Hamilton v. Regents, 293 U. S. 245 (1934) .....	19
Jamison v. Texas, 318 U. S. 413 (1943) .....	12
McCollum v. Board of Education, 333 U. S. 203 (1948) .....	12, 13, 16, 22
Meyer v. Nebraska, 262 U. S. 390 (1923) .....	19
Murdock v. Pennsylvania, 319 U. S. 105 (1943) .....	12
People v. Friedman, 302 N. Y. 75 (1951), appeal dismissed, 341 U. S. 907 (1951) .....	17, 18, 19, 20
Pierce v. Society of Sisters, 268 U. S. 510 (1924) .....	19
Prince v. Massachusetts, 321 U. S. 158 (1944) .....	19
Reynolds v. United States, 98 U. S. 145 (1878) .....	16, 19
Saia v. New York, 334 U. S. 558 (1948) .....	14
Story v. Craig, 231 N. Y. 33 (1921) .....	6

#### CONSTITUTIONS, STATUTES AND RULES

Board of Education By-law, Section 90, subdivision 30 .....	2, 11
Civil Practice Act, Sections 360-365 .....	14
Education Law, Section 2554 .....	11
General Construction Law, Section 24 .....	14
New York City Charter, Section 394 .....	1
New York Laws of 1851, Chapter 386, Section 18 .....	11
New York Laws of 1882, Chapter 410 .....	11
New York Laws of 1897, Chapter 378 .....	11
New York Laws of 1901, Chapter 466 .....	11



	PAGE
Rules of the Supreme Court, Rule 27, subdivision 9d..	1
Tax Law, Section 360, subdivision 10.....	14
Title 5, U. S. C., Section 16 .....	14
Title 26, U. S. C., Section 101 subdivision 6 .....	14
Title 28, U. S. C., Section 453 .....	14
United States Constitution, Article I, Section 7.....	17
United States Constitution, Amendment I.....	12

## OTHER AUTHORITIES

An Introduction to English Literature by H. S. Pan-	
coast (3rd Edition, New York, 1907).....	6
1 Annals of Congress 758.....	16
Bible Selections .....	6
English Prose Style by Herbert Read (London, 1928)...	7
Moral and Spiritual Values in the Public Schools pub-	
lished by the Educational Policies Commission of	
the National Educational Association of the United	
States and the American Association of School Ad-	
ministrators, 1951 .....	4
Public Education in the United States by Cubberley,	
1919 .....	10
Religion and Education under the Constitution by	
O'Neill .....	16
The Bible and the Common Reader by Mary Ellen	
Chase, 1944 .....	8
The Great Rehearsal by Van Doren.....	17
The Problem of Style by J. Middleton Murry (London,	
1930) .....	7, 8



# Supreme Court of the United States

OCTOBER TERM, 1951

No. 9

---

DONALD R. DOREMUS and ANNA E. KLEIN,  
*Appellants,*

v.  
BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE and  
the STATE OF NEW JERSEY,  
*Appellees.*

---

APPEAL FROM THE SUPREME COURT OF THE STATE  
OF NEW JERSEY

---

**BRIEF, AMICUS CURIAE, BY THE CITY OF NEW YORK  
ON BEHALF OF THE BOARD OF EDUCATION OF THE  
CITY OF NEW YORK, WITH SPECIAL REFERENCE TO  
THE NEW YORK CITY PRACTICE OF READING A POR-  
TION OF THE BIBLE, WITHOUT COMMENT, AT ALL  
SCHOOL ASSEMBLIES**

---

## Preliminary Statement

The City of New York, a political subdivision of the State of New York, by its responsible and authorized law officer, the Corporation Counsel of The City of New York, sponsors this brief on behalf of the Board of Education of the City of New York. *Rules of the Supreme Court, Rule 27, subd. 9d; New York City Charter, § 394.*

## The Question Presented

The question presented is not whether it is educationally desirable that the Bible should or should not be read in the public schools. The New Jersey Legislature has resolved this question of policy. The sole issue as it affects this *amicus* is whether the New Jersey Legislature in causing excerpts from the Old Testament of the Bible to be read is transgressing the 1st Amendment guaranteed of religious liberty or the ban against the establishment of a religion. In other words the issue is not the *wisdom* of Bible reading in the public schools but solely one of *power*.

## The Interest of the Amicus.

The educational affairs of the City of New York are under the general management and control of the Board of Education of the City of New York. The present Board of Education and the various predecessor educational boards of localities which were consolidated into The City of New York in 1898 have always maintained the practice of opening public school assemblies with the reading of a portion of the Bible without comment. This practice is continued today by virtue of Board of Education By-law § 90, subdivision 30, which reads as follows:

"The regular assemblies of all schools shall be opened by reading to the pupils a portion of the Bible without comment."

The Lord's Prayer is not read in the New York City schools except as it may be the portion of the Bible read for a particular assembly.

Accordingly, the Board of Education of The City of New York considers it a matter of vital concern to its proper administration of the City's school system that the decision of the Supreme Court of the State of New Jersey in this case, at least so far as it concerns "Bible reading," be affirmed and that its own practice be upheld.



## **The Secular Purpose of Bible Reading in New York City**

The schools of the City of New York have always, continuously and uninterruptedly, had a portion of the Bible read to their students without comment. Historically, this practice originated in colonial times when the schools were all church schools. The practice continued through the 1800's when the idea of free public schools under State control was developed, during the fight in the middle of the 19th century to eliminate sectarianism, and up to today when they constitute the main training ground for democratic development. Just as the schools have been changed from Church sponsorship into free public schools sponsored by the State, so the purpose in reading the Bible has undergone a comparable change. In the public schools the Bible is not regarded primarily as the sacred book of the three major religions in this country. The Bible is used today as one of the significant secular means (1) of bringing students into contact with a sphere of thought which is inextricably integrated with life itself, (2) of teaching moral and spiritual values, (3) of making children aware of an important literary achievement.

The public schools have a highly significant duty to teach not only organized subject matter such as the social sciences or literature and the cultural traditions of this country but also moral and spiritual values. Accordingly they are obliged to devise ways in which such education may be developed.

They are aware that this must be done within the framework of our Constitution which prohibits the establishment of a religion but which does not thereby mean the rejection of religion itself or of the multitude of subjects or studies which may have had their origin in religion or whose development has been influenced by religion, e.g. art,

music, literature. The public schools of the City of New York, like the Government of the United States, stand firmly for freedom of religious belief.

# (1)

## **As a means of teaching moral and spiritual values .**

The American people have rightly expected the schools of this country to teach moral and spiritual values to the youth of the land. The schools in general and the public schools in New York City in particular have accepted this responsibility. By moral and spiritual values we mean those values which when they abide in human behavior exalt and refine life and bring it into accord with the standards of conduct that are approved in our democratic culture.

Our first duty is to define what are the essential values upon which our society rests, and upon which substantial agreement exists among the people of the United States. One of the best statements of such values is contained in the report entitled "Moral and Spiritual Values in the Public Schools" published by the Educational Policies Commission of the National Education Association of the United States and the American Association of School Administrators, 1951. The City of New York is especially proud of this report since its Superintendent of Schools, William Jansen, served on the Commission which prepared the report. Political expression of these basic values may be found in the Declaration of Independence, our Constitutions, both National and State, and in many other state papers and documents which have contributed to our culture as a democracy and form the traditional creed of our nation. It is significant that these values have also been expressed in the Bible.

As expressed in this report the basic moral and spiritual value in American life is the supreme importance of the individual personality. This is the basic value common to both our Judaeo-Christian culture and our political philosophy. From this basic value other values necessarily follow: that each person should feel responsible for the consequences of his own conduct; that institutional arrangements are the servants of mankind; that mutual consent is better than violence; that the human mind should be liberated by access to information and opinion; that excellence in mind, character and creative ability should be fostered; that all persons should be judged by the same moral standards; that the concepts of brotherhood and the commonweal should take precedence over selfish interests; that each person should have the greatest possible opportunity for the pursuit of happiness, provided only that such activities do not substantially interfere with the similar opportunities of others; that each person should be offered the emotional and spiritual experiences which transcend the materialistic aspects of life.

How are these essential values to be brought home to our students? Character education and the imparting of moral and spiritual values take place as part of the entire educative process. Organized subjects, such as natural and social sciences, literature and music, and special guidance programs, hobbies, sports and special activities in the classroom, homeroom or school assembly, all leave their mark. So, too, with the reading of the Bible in the school assembly. It has ever been one of the traditional methods of bringing a sense of moral values to the students, because in the thought provoking narratives, poetry, proverbs and letters of the Bible we find expressed the inspiring ideals of integrity, loyalty, friendship, respect for the feelings and rights of others, sympathy with suffering and affliction, generosity, unselfishness and helpfulness, cheerfulness, love of work, courtesy, charity, chivalry, heroism, courage, love

of truth, reliability, love of right, refinement of thought and heart, love of fellow man, and other ideals which are touched upon only incidentally in the courses of study. Further, concrete examples of the lives of good men set us an example and invite imitation.

Typical selections or portions of the Bible read, to illustrate these ideals, are the Story of Joseph (Genesis, Ch. XXXVII); Bricks Without Straw (Exodus, Ch. V); The Ten Commandments (Exodus, Ch. XX, 1-18); The Golden Calf (Exodus, Ch. XXXII, 1-8, 15-20); Ruth and Naomi (Ruth, Ch. I); David and Goliath (Samuel I, Ch. XVII); Solomon's Judgment Concerning The Two Mothers And The Child (Kings I, Ch. III); Life of Job (Job, Ch. I); Beat the Swords into Plowshares (Isaiah, Ch. II); Daniel Cast Into the Lions' Den (Daniel Ch. VI); The Golden Rule (Matthew, Ch. VII, 1-12); The Prodigal Son (Luke, Ch. XV, 11-32); Good Samaritan (Luke, Ch. X, 33).

## (2)

### As literature

The value of the Bible as a masterpiece of English prose and as an aid in teaching pupils how to speak and write good English is too well established and is too deeply rooted a tradition to be ignored and upset at this late date. We "do not readily overturn the settled practice of the years." CARDOZO, J. in *Story v. Craig*, 231 N. Y. 33, 40 (1921).

In *An Introduction to English Literature*, by H. S. PANCOAST (3rd Ed., New York, 1907), the author states (p. 123):

"It is safe to say that the English translation of the Bible is the greatest monument of our prose literature. Its influence on prose literature has been incalculable. Many of the greatest masters of English prose have drawn from it as from a great storehouse, so that biblical illustrations and biblical phrases have been wrought into the very fabric of the literature.



7  
The style of our English Bible has a dignity, simplicity, and force that have seldom been approached and never excelled."

And again (p. 188):

"The *English Bible* not only influenced the course of history; it did much, as has already been said, to shape and settle the standards of English prose."

In *English Prose Style*, by HERBERT READ (London, 1928), the author states (p. 111):

"The various editions of the English Bible, from Coverdale's in 1539 to the Authorized Version of 1611, consolidated and established the English idiom which had gradually been formed during the fourteenth and fifteenth centuries; they exemplify all the characteristics of a true narrative style—concreteness, economy and speed. . . . the English Bible has been the greatest single influence on the development of English prose style, . . ."

And again (pp. 121-122):

"With the Brontes (the remark is true, at any rate of Charlotte as well as of Emily), a new vitality and stricter realism came into English fiction; it was a return to Swift and Defoe, or rather, to the fount of even these writers, for we know that the Bible was the most considerable literary influence in Emily Bronte's life. In prose fiction there has been since the middle of the last century no general lapse from this original English idiom among writers of distinction. This idiom, moreover, has been made the basis of American narrative style, not only in authors like Hawthorne, who may be said to belong to the English tradition, but in modern writers like Sherwood Anderson and Ernest Hemingway, who owe little or nothing directly to this tradition."

J. MIDDLETON MURRY, one of the ablest of the contemporary literary critics, in *The Problem of Style* (London,

1930), quotes the passage from the New Testament (Matt., xi, 28) beginning "Come unto me all ye that labour and are heavy laden, and I will give you rest", and then says in comment upon it (pp. 129-130):

"There the language itself has a surpassing beauty. The movement and sound of the first sentence is exquisite, I have no doubt a thousand times more beautiful than the Greek, which I have forgotten if I ever knew it. But still, but still—would it be so very different in its effect in the Greek? I doubt it. In whatever language that sentence was spoken to you, your depths would be stirred. Our common humanity reaches out after the comfort of the words; all that there is of weariness and disappointment, of suffering and doubt, in all men stretches out for some small share in this love that might have changed the world. Apply your coldest test to it, and it remains great style; and when a man appears who can use it again, perhaps the face of the earth will be changed, for assuredly there is a mystery in the love which finds expression in it."

The story tellers of the Bible have related stories of all types of persons: the wise and the foolish, the rich and the poor, the faithful and the treacherous, the designing and the generous, the pitiful and the prosperous, the innocent and the guilty, the spendthrift and the miser, the players of practical jokes and their discomforted victims, the sorry, the tired, the old, the exasperated young, friends who counted no cost for friendship, bad mannered children and children well brought up, a little boy who had a headache in a hayfield, a little servant girl who wanted so much her master's health that she dared to give him good if unpalatable advice.

There are countless proverbs in the Bible, many contained in that part of the Bible entitled "Proverbs", others

---

\* "The Bible and the Common Reader," MARY ELLEN CHASE, Macmillan Co., 1944.

scattered elsewhere, maxims and aphorisms, some of great antiquity, some of other origin than Jewish. Proverbs as all know are one of the most ancient and perennial forms of literature, reflecting the sagacity and common sense of practical men of all ages in their attempt to get on reasonably well in life. Often do we quote them unconscious of their origin.

The words, phrases, images and similes in the Bible have become part and parcel of our common English speech. In our every day dealings we clarify and illuminate our talk with one another by the often unconscious use of its language. An unwelcome neighbor becomes "gall and wormwood" or "a thorn in the flesh"; a hated task, "a millstone about the neck"; we escape from one thing or another "by the skin of our teeth"; we earn our bread "by the sweat of our faces"; we "strain at gnats and swallow camels"; tired at night, we say that "our spirit is willing but our flesh is weak"; in moments of anger we remember that "a soft answer turneth away wrath"; we warn our children that if "they sow the wind they shall reap the whirlwind"; words fitly spoken are "like apples of gold in pictures of silver"; our friends are "the salt of the earth"; we refer to laboring men as "hewers of wood and drawers of water"; we long for the time when men "shall beat their swords into plowshares and their spears into pruning hooks".

Without a knowledge of the language of the Bible the best of our literature would be obscure. No liberal education is truly liberal without it.

### (3)

#### **As part of our American culture**

The Bible to Americans is a national monument. It paved the way for the Bill of Rights and in 17th and 18th

century America it supplied not only the names of our ancestors but the stout precepts by which they lived. It was the source of the convictions that shaped the building of this country, of the faith that endured the first New England winters and later opened up the Great West. It laid the foundation of our educational system, built our earliest colleges and dictated the training within our homes. In the words alike of Jefferson and Patrick Henry, John Quincy Adams and Franklin it made better and more useful citizens by reminding man of his individual responsibility, his own dignity and his equality with his fellow man. Is it conceivable that Lincoln could have written his Gettysburg Address without his knowledge of the Bible and its rich overtones? The Bible is, indeed, so imbedded in our American heritage that not to recognize its place there becomes a kind of national apostasy, and not to know and understand it, in these days, when we give all for its principles of human worth and human freedom, is an act unworthy of us as a people.

### **The Legal Basis of Bible Reading in New York City**

Horace Mann, who was a leader in the fight to establish free public schools and to eliminate sectarianism in them, nevertheless said of the Bible that it was an invaluable book for forming the character of children and should be read without comment in the schools. This didn't mean, he went on to say, that it was necessary to teach the Bible.

CUBBERLEY, "*Public Education in the United States*," 1919, p. 176.

It was undoubtedly Horace Mann's influence which motivated the New York Legislature, over one hundred years ago, to ban sectarianism from the New York public



schools by law and at the same time preserve the historical and traditional place of the Bible in our public schools (L. 1851, ch. 386, § 18).

Sectarian teaching in the public schools has long since been eliminated but the reading of the Bible in the public schools without note or comment has continued to date. This statute has been reenacted three times by the legislature; first, in 1882 (L. 1882, ch. 410, the Consolidation Act of the City of New York), then in 1897 (L. 1897, ch. 378, the Greater New York Charter) and again in 1901 when it became § 1151 of the Greater New York Charter (L. 1901, ch. 466).

New York Education Law § 868 (now § 2554) prescribes generally the powers and duties of the Board of Education. Among these we find, in subdivision 13, that the Board has the power and it is made its duty "to prescribe such regulations and by-laws as may be necessary \* \* \* for the general management, operation, control, maintenance and discipline of the schools \* \* \* and

"15. a. To perform such other duties and possess such other powers as may be required to administer the affairs placed under its control and management, to execute all powers vested in it, and to promote the best interests of the schools and other activities committed to its care, \* \* \*"

Pursuant to this rule making power, the Board of Education adopted By-law §90. subd. 30 which reads as follows:

"The regular assemblies of all schools shall be opened by reading to the pupils a portion of the Bible without comment."

It is thus under the extant By-law that the Board of Education of the City of New York requires that all public

assemblies in the schools be opened by a reading of a portion of the Bible without comment.

An attack upon the constitutionality of Bible reading in the New York City public schools was rejected by the New York Courts in *Lewis v. Board of Education*, 157 N. Y. Misc. Rep. 520 (Sup. Ct., N. Y. Co., 1935), modified 247 App. Div. 106 (1st Dept., 1936); appeal dismissed, 276 N. Y. 490 (1937).

## ARGUMENT

The reading of portions of the Bible, without comment, in public school assemblies is constitutionally unobjectionable; that, as an incident to Bible reading, religion generally, or religious thinking, may thereby be aided is subordinate to the proper educational purpose served.

### (1)

The First Amendment of the United States Constitution provides:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .”

While this amendment refers specifically only to Congress, it is now well settled that the prohibitions imposed upon Congress by the First Amendment constitute, by virtue of the Fourteenth Amendment, prohibitions against the States or those acting under color of State power.

*Cantwell v. Connecticut*, 310 U. S. 296 (1940);

*Murdock v. Pennsylvania*, 319 U. S. 105 (1943);

*Jamison v. Texas*, 318 U. S. 413 (1943);

*West Virginia State Board of Education v. Barnette*, 319 U. S. 624 (1943);

*Everson v. New Jersey*, 330 U. S. 1 (1947);  
*McCullum v. Board of Education*, 333 U. S. 203  
 (1948).

If we understand correctly the argument of the appellants (opponents of Bible reading) it is something like this: pointing to the "wall of separation between Church and State" they say that the "wall" is the barrier which precludes Bible reading at school assemblies. No other consideration, they say, is pertinent to this field of argument. They rest their entire case on the "wall" which they assert must be kept "high and impregnable."

We are not unmindful that, in referring to the breadth and scope of the First Amendment, some of the Justices of this Court in the *Everson* case (330 U. S. at pp. 15-16) and in the *McCullum* case (333 U. S. at pp. 210-211) stated:

"Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"

This is a far cry from supporting the argument now advanced by the opponents of Bible reading. The metaphorical concept embodied in the expression "wall of sepa-

ration between church and State" must be evaluated, we insist, with regard to the precise factual situation in each particular case and cannot be applied indiscriminately. To do otherwise would be to argue in a vacuum.

Moreover, the unrestricted, unlimited and unreasoned acceptance of the metaphor would fly in the face of our national tradition and give rise to all sorts of incongruous results. The unmitigated unthinking of our opponents in urging the elevation of the metaphor to an absolute leads to absurdity. For example, it would be unlawful for Congress to appropriate moneys for the payment of salaries to the Chaplains in our Armed Forces or to those who, from earliest times, have opened each session of the Congress with prayer. Religious services at public hospitals to comfort the sick and dying and in penal institutions to give spiritual aid to the imprisoned and solace to the condemned would be banned. The New York State and United States provisions for the form of an oath, thereby invoking moral sanctions for the proper administration of justice and the machinery of government would be unconstitutional. (New York Civil Practice Act, §§ 360-365; 5 U. S. C. 16\*; 28 U. S. C. 453.) Tax exemption for religious institutions and tax deductions for contributions to religious organizations would be invalid (26 U. S. C. 101 subd. 6; N. Y. Tax Law, § 360 subd. 10). Invoking of the Deity in Thanksgiving proclamations or to assist our Armed Forces would be stopped. Our trust in God would have to be eliminated from our coins. The Constitution of the State of New York would in itself be unconstitutional at the point in its preamble where it expresses gratitude to an "Almighty God" for our freedom. Laws making Christmas and Sunday legal holidays would be bad (New York General Construction Law, § 24). Laws providing

---

\* The oath prescribed by 5 U.S.C. 16 for any person elected or appointed to any office of honor or profit either in the civil, military or naval service, except the President of the United States, is as follows: "I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States \* \* \* So help me God."



for the incorporation of ecclesiastical bodies would have to be stricken out. Denominational colleges would be barred from receiving students under the "G.I. Bill of Rights." Religious groups would be barred from holding meetings in public parks. But see *Saia v. New York*, 334 U. S. 558 (1948). Public school children would be barred from singing "America", part of which is a prayer to God to "protect us by Thy might," "God Bless America" and so much of "America the Beautiful" which recites:

"God shed his grace on thee and crown thy hood  
with brotherhood."

That such illogical results were not contemplated by this Court in its definition of the meaning of the First Amendment is clear from the holding in the *Everson* case in which this Court first referred to the wall separating Church and State, see *supra*, p. 13. In the *Everson* case this Court sustained the power of a local school board to pay the transportation charges of children attending a Catholic parochial school. Can it be denied that the religious school thereby received an indirect or incidental benefit?

Furthermore, the Court did not overrule either *Cochran v. Louisiana*, 291 U. S. 370 (1930) or *Bradfield v. Roberts*, 175 U. S. 291 (1899). In the *Cochran* case this Court sustained the State's purchase of textbooks for all school children including those attending parochial schools. And in the *Bradfield* case an appropriation to a Catholic hospital was sustained.

Nor has this Court ever overruled its earlier statement that ours is a religious nation and that the stability of our government rests upon the basis of a belief in God. *Church of the Holy Trinity v. U. S.*, 143 U. S. 457 (1892).

## (2)

In ascertaining the true meaning of the First Amendment we must keep in mind the intent of the people who adopted it, the objects sought to be accomplished and the evils sought to be prevented or remedied.

A comprehensive statement of the historical background of the First Amendment need not be indulged in here since the subject has received extensive treatment by this Court. *Reynolds v. United States*, 98 U. S. 145, 162-165 (1878); *Everson v. New Jersey*, 330 U. S. 1, 8-13, 33-43 (1947); *McCullum v. Board of Education*, 333 U. S. 203, 244-248 (1948).

When the Constitution was adopted there were still established churches in five of the States and a few years earlier there had been nine of them in the thirteen colonies. (O'NEILL, "*Religion and Education under the Constitution*", p. 97.) "Establishment" of a church or religion always and necessarily means an act of government favoring one particular church or group of churches. Historically, that is exactly what the amendment meant to the framers of the Constitution and to the Congress of the people who adopted it. There is only one exposition in the annals of Congress of the meaning and no contemporary proofs to the contrary. Madison, the author, said during the first Congress (Annals of Congress for August 15, 1789; Volume I, p. 758) that the amendment mandated:

"That Congress shall not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."

The necessity for the amendment, he went on to say, was a fear by some that Congress might otherwise have power to "make laws of such a nature and might infringe the rights of conscience and establish a national religion" and he repeated that the amendment was intended "to prevent these effects". Finally he noted that the amendment was being added because "the people feared one sect might obtain a pre-eminence, or to combine together, and establish a religion to which they would compel others to conform".

Such fears had indeed been expressed during the campaign to ratify the Constitution as originally drawn. (See VAN DOREN, *"The Great Rehearsal"*, pp. 217, 237). No one at that time or for years thereafter ever attributed to the First Amendment any broader meaning. Separation of Church and State is a figure of speech which the opponents of Bible reading have seized upon without regard to the context in which this Court has considered it as expressing the general intentment of the First Amendment. This phrase is not in the Constitution. Nor did the founding fathers intend, nor could they have intended that there shall be a total separation of Church and State to the extent of prohibiting governmental encouragement of, or cooperation with, religions generally. It did not mandate governmental hostility or indifference to religion or recognition of God. The Constitution did not decree that this is to be a godless nation.

Separation of Church and State is a relative concept. There is no such thing as a completely free church in a free state or a state without religious influences. Our churches must be built in accordance with our building codes and fire laws and indeed their legal incorporation is regulated by State law. On the other hand, the State has repeatedly availed itself of religion by invoking the moral sanctions of oaths, in looking to God as the creator of our "inalien-

able rights" (The Declaration of Independence) and in the many other ways previously alluded to which make up the warp and woof of our American way of life. Indeed the Constitution itself recognizes Sunday as a non-business day. *U. S. Const. Art. I, Sec. 7. cf. People v. Friedman*, 302 N. Y. 75 (1951), appeal dismissed for want of a substantial Federal question, 341 U. S. 907 (1951).

In *People v. Friedman, supra*, the New York Court of Appeals, in sustaining the constitutionality of the "Sunday laws" in the face of an attack that they violated the First Amendment, recognized that they may be said to have had a religious origin but that they since have come to serve a proper State purpose of providing for a regular day of rest. In upholding the Sunday laws, the Court said (302 N. Y. at p. 79):

"It does not set up a church, make attendance upon religious worship compulsory, impose restrictions upon expression of religious belief, work a restriction upon the exercise of religion according to the dictates of one's conscience, provide compulsory support, by taxation or otherwise, of religious institutions, nor in any way enforce or prohibit religion."

The rule which evolves from an analysis of the several cases in this Court and our national tradition would seem to require a recognition of the distinction between religion as a functional experience of mankind and religion as institutionalized by various churches and sects, between religion *per se* and sectarianism, between a recognition of our Judaeo-Christian culture and tradition and the dogma, creed, tenets and doctrines of the separate faiths.



## (3)

An accommodation must be struck between the First Amendment prohibition against the "establishment of religion" and the Tenth Amendment reservation of power to the people, in this case acting through their local Board of Education, to provide for the reading of a portion of the Bible, without comment, to the children at the assembly, since it has been demonstrated that such readings serve a proper educational purpose. That such readings may be said indirectly or incidentally to aid religion in some degree or coincide with the desires of religious leaders, is immaterial from a constitutional point of view. Illustrations of other situations involving some incidental benefit to religion which have been found to be constitutionally unobjectionable are *Everson v. Board of Education*, 330 U. S. 1 (1947); *Cochran v. Louisiana*, 281 U. S. 370 (1930); *Bradfield v. Roberts*, 175 U. S. 291 (1899); *People v. Friedman*, 302 N. Y. 75 (1951), appeal dismissed, 341 U. S. 907 (1951).

If we approach the problem of the true meaning of the First Amendment with respect to its guarantee of religious liberty, "or prohibiting the free exercise thereof [religion.]", we come to the same conclusion—namely that a reconciliation or accommodation of conflicting rights must be made. This, of course, is always a delicate matter.

Thus, in *Pierce v. Society of Sisters*, 268 U. S. 510 (1925) the State's attempt to compel all children to attend at the public schools had to give way to the parent's paramount right to educate his child in accordance with the parent's religious beliefs. In *West Virginia v. Barnette*, 319 U. S. 624 (1943), so much of the State's attempt to compel all children to salute the flag had to give way to the religious convictions of some children that saluting the flag was a form of worship to a graven image contrary to their

religious beliefs. In *Meyer v. Nebraska*, 262 U. S. 390 (1923), a State's attempt to have only English taught in all schools had to give way to the parent's right to have his children educated in other languages.

But in *Reynolds v. United States*, 98 U. S. 145 (1878), the individual's religious belief in polygamy had to give way to the State's ban on bigamy. In *Prince v. Massachusetts*, 321 U. S. 158 (1944), the individual's belief that his religion compelled his children to go on the public highways to propagandize their religion had to give way to the State's law prohibiting child labor. A person's religious scruples constituted no exemption from the State's requirement to bear arms or compulsory military training. In *re Summers*, 325 U. S. 561 (1945); *Hamilton v. Regents*, 293 U. S. 245 (1934). See also *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1942).

From an analysis of the above cases we deduce the principle that a delicate accommodation must be arrived at in each case with due weight being given to the individual's right to freedom of religious expression on the one hand and the State's duty to all citizens of providing for their mutual health, safety, morals and general welfare. Stated in another way, the State's effort to provide for the general welfare, safety and morals of its citizens will not be struck down where as an *incident* to such program religion or a religion is indirectly aided. What is an incidental benefit in the latter cases, or in what direction the scales of accommodation are to be tipped in the former cases is a matter to be decided in each particular case, due regard being given to all the facts and circumstances in each case.

In many spheres the interests of the State and of religion coincide. We have mentioned the identity between the Judaeo-Christian concept and our democratic philoso-

phy that all men as the children of God are created equal with certain inalienable rights, that the supreme worth and inherent dignity of persons must be respected, that the wickedness of exploiting them must be denounced, that the golden quality of mercy, the inexorableness of the law that he that soweth the wind shall reap the whirlwind, must be recognized.

Other instances of the concededly valid exercise of State power which happen to coincide with the desires of religious leaders readily come to mind. That most religions sanctify marriage does not mean that the State cannot also make laws looking toward the permanency of the marriage ties. That Sunday is considered the Sabbath does not bar the State from making Sunday a day of rest. *People v. Friedman, supra.*

Still other examples of the complexity of the religious problem applied to the field of education were foreshadowed by Mr. Justice FRANKFURTER's dissent in the *Flag Salute* case (*West Virginia v. Barnette, supra*) and by Mr. Justice JACKSON in his concurring opinion in the *McCullum* case, *supra*.

In the *Barnette* case, Mr. Justice FRANKFURTER at page 659 (319 U. S. 624), said:

"Consider the controversial issue of compulsory Bible-reading in public schools. The educational policies of the states are in great conflict over this, and the state courts are divided in their decisions on the issue whether the requirement of Bible-reading offends constitutional provisions dealing with religious freedom. The requirement of Bible-reading has been justified by various state courts as an appropriate means of inculcating ethical precepts and familiarizing pupils with the most lasting expression of great English literature. Is this Court to overthrow such variant state educational policies by denying states the right to entertain such convictions in regard to their school systems, because of a

belief that the King James version is in fact a sectarian text to which parents of the Catholic and Jewish faiths and of some Protestant persuasions may rightly object to having their children exposed? On the other hand the religious consciences of some parents may rebel at the absence of any Bible-reading in the schools. See *Washington ex rel. Clithero v. Shoualter*, 284 U. S. 573. Or is this Court to enter the old controversy between science and religion by unduly defining the limits within which a state may experiment with its school curricula? The religious consciences of some parents may be offended by subjecting their children to the Biblical account of creation, while another state may offend parents by prohibiting a teaching of biology that contradicts such Biblical account. Compare *Scopes v. State*, 154 Tenn. 105, 289 S. W. 363. What of conscientious objections to what is devoutly felt by parents to be the poisoning of impressionable minds of children by chauvinistic teaching of history? This is very far from a fanciful suggestion for in the belief of many thoughtful people nationalism is the seed-bed of war."

In the *McCullum* case, Mr. Justice JACKSON warned against giving unrestricted scope to the Court's opinion without laying down some limitations. At pages 235-236 he said:

"If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits.

While we may and should end such formal and explicit instruction as the Champaign plan and can at all times prohibit teaching of creed and catechism and ceremonial and can forbid forthright proselyting in the schools, I think it remains to be demonstrated whether it is possible, even if desirable, to comply with such demands as plaintiff's completely to isolate



and cast out of secular education all that some people may reasonably regard as religious instruction. Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. Yet the inspirational appeal of religion in these guises is often stronger than in forthright sermon. Even such a 'science' as biology raises the issue between evolution and creation as an explanation of our presence on this planet. Certainly a course in English literature that omitted the Bible and other powerful uses of our mother tongue for religious ends would be pretty barren. And I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by a large part of the world's peoples. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.

But how one can teach, with satisfaction or even with justice to all faiths, such subjects as the story of the Reformation, the Inquisition, or even the New England effort to found 'a Church without a Bishop and a State without a King,' is more than I know. It is too much to expect that mortals will teach subjects about which their contemporaries have passionate controversies with the detachment they may summon to teaching about remote subjects such as Confucius or Mohammed. When instruction turns

to proselyting and imparting knowledge becomes evangelism is, except in the crudest cases, a subtle inquiry."

With special reference to the case at bar, we believe that it has been amply demonstrated that reading of the Bible without comment in public school assemblies serves a proper educational purpose and the fact that such reading from the Bible coincides with the desires of religious leaders is an inadequate reason for striking it down. See *Everson v. New Jersey*, *supra*, *Cochran v. Louisiana Board of Education*, *supra*.

As a generalized conception we believe that the reading of the Bible without comment at public school assemblies is constitutionally unobjectionable. It is only where some specific pattern of abuse may be shown that the Court's power to intervene should be invoked. The reading of the Bible must take its proper place in the overall pattern of influences which are brought to bear for the proper preparation of children for life in American democracy.

#### (4)

We are aware, of course, of the many State Court cases dealing with the problem of Bible-reading in the public schools. We have not cited or discussed such cases because the parties to this controversy, and especially the Attorney General of New Jersey, have amply covered this phase.

**CONCLUSION**

**The judgment appealed from should be affirmed.**

**January 16, 1952.**

**Respectfully submitted,**

**DENIS M. HURLEY,**  
*Corporation Counsel of the City  
of New York.*

**MICHAEL A. CASTALDI,  
SEYMOUR B. QUEL,  
DANIEL T. SCANNELL,  
ARTHUR H. KAHN,**  
*of Counsel.*